MALAYSIAN REPORTS

Commonwealth of Australia v Midford (Malaysia) Sdn Bhd & Anor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-45-89
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
9 FEBRUARY 1990

Criminal Procedure — Search and seizure — Application for order to return documents and to restrain from conducting any further illegal searches and seizures — Documents seized by officers of Australian Customs Service with the help of officer of Royal Customs, Malaysia — Whether High Court can grant relief by way of injunction in criminal cause or matter — Plea of sovereign immunity — Doctrine of restrictive immunity — Acts not done within trading or commercial activity of foreign state — Doctrine of sovereign immunity applicable

International Law — Foreign states — Immunity from jurisdiction — Doctrine of restrictive immunity — Seizure of documents by customs officers of Australia — Acts not done within trading or commercial activity of foreign state — Application of doctrine of sovereign immunity — Certificate from Ministry of Foreign Affairs

Civil Law Act — Common law — Development of after 1956 — Civil Law Act 1956, s 3

In this case, officers of the Australian Customs Service with the assistance of an officer of the Royal Customs, Malaysia had seized certain documents and files and copies of documents belonging to the respondent. The respondent had applied for an order that the documents seized be returned to them and that the Director-General of Royal Customs, Malaysia and the Commonwealth of Australia and their servants/agents be restrained from conducting any further illegal searches or seizures on the premises of the respondents. The High Court made the orders, Anuar J holding that the Commonwealth of Australia was not entitled to pure absolute immunity from the jurisdiction of the Malaysian courts. The appellant appealed.

Held, allowing the appeal:

(1) A High Court in this country when exercising its criminal jurisdiction and even taking into account s 5 of the Criminal Procedure Code (FMS Cap 6) should not in the exercise of its powers when hearing a criminal cause or matter purport to grant relief by way of injunction to individuals. On this score and for these reasons the order of the High Court in this case should not have been made.

(2) The restrictive doctrine of sovereign immunity as developed in the common law after 1956 should apply in Malaysia.

(3) The acts of the two Australian customs officers considered in the whole context of this case could not be classified as 'trading or commercial'.

(4) In applying the doctrine of sovereign immunity, our courts, whether in the exercise of its civil or criminal jurisdiction, should have by international comity disclaimed jurisdiction in this case, especially after the production of the certificate from Wisma Putra stating that the Yang di-Pertuan Agong has recognized the Commonwealth of Australia as a foreign state.

[Di dalam kes ini, pegawai-pegawai Perkhidmatan Kastam Australia dengan bantuan daripada pegawai Kastam Di Raja Malaysia, telah merampas beberapa dokumen dan fail dan salinan dokumen kepunyaan responden. Responden telah memohon perintah supaya dokumen yang dirampas itu dikembalikan kepadanya dan supaya Ketua Pengarah Kastam Di Raja Malaysia dan Komanwel Australia dan kakitangan/wakil mereka ditegah dari menjalankan penggeledahan atau rampasan menyalahi undang-undang di tempat responden. Mahkamah Tinggi telah membuat perintah-perintah itu; Anuar H memutuskan bahawa Komanwel Australia tidak berhak mendapat kekebalan jati dan mutlak daripada bidangkuasa Mahkamah Malaysia. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Mahkamah Tinggi di negara ini apabila menjalan bidangkuasa jenayahnya dan walaupun diambilkira s 5 Kanun Acara Jenayah (FMS Cap 6) hendaknya tidak semasa menjalankan kuasa-kuasanya apabila mendengar suatu kes atau perkara jenayah, mencuba memberi relif melalui injunksi kepada orang-orang perseorangan. Oleh kerana itu dan atas sebab-sebab itu perintah Mahkamah Tinggi di dalam kes ini tidak seharusnya dibuat.

(2) Doktrin terhad mengenai kekebalan pemerintah berdaulat seperti yang dimajukan di dalam common law selepas 1956 hendaklah dipakai di Malaysia.

(3) Memandangkan keseluruhan konteks kes ini, perbuatan dua pegawai Kastam Australia tidak boleh dijeniskan sebagai 'perniagaan atau perdagangan'.

(4) Di dalam memakai doktrin kekebalan pemerintah berdaulat, mahkamah kita samada di dalam menjalankan bidangkuasa sivil atau jenayahnya hendaklah, menurut hal saling hormat-menghormati antarabangsa, menolak bidangkuasanya di dalam kes ini khususnya selepas pengemukaan perakuan dari Wisma Putra yang mengatakan bahawa Yang di-Pertuan Agong telah mengiktiraf Komanwel Australia sebagai negeri asing.]

Cases referred to

1 *Duff Development Co* v *Govt of Kelantan* [1924] AC 797 (refd)
2 *Village Holdings Sdn Bhd* v *Her Majesty The Queen in right of Canada* [1988] 2 MLJ 656 (refd)
3 *The 'Parlement Belge'* (1880) 5 PD 197 (refd)
4 *The 'I Congreso del Partido'* [1983] 1 AC 244 (folld)
5 *R* v *Madan* [1961] 2 QB 1 (refd)
6 *Sultan of Johore* v *Tungku Abu Bakar* [1952] MLJ 115 (refd)
7 *Compania Naviera Vascongado* v *SS Cristina* [1938] AC 485 (refd)
8 *Rahimtoola* v *Nizam of Hyderabad* [1958] AC 379 (refd)
9 *Trendtex Trading Corporation* v *Central Bank of Nigeria* [1977] 2 WLR 356; [1977] 1 All ER 881 (folld)
10 *Philippine Admiral (Owners)* v *Wallen Shipping (HK) Ltd* [1977] AC 373 (folld)
11 *A-G for the State of Queensland (ex rel Kerr) & Anor* v *T* (1983) 57 ALJ 285 (refd)
12 *CBS Songs Ltd & Ors* v *Amstrad Consumer Electronics plc & Anor* [1988] 1 Ch 61; [1988] 2 WLR 1191 (HL) (folld)
13 *Gouriet* v *Union of Post Office Workers* [1978] AC 435 (folld)
14 *Prudential Assurance Company* v *Knott* (1875) 10 Ch Appeal 142 (folld)
15 *White* v *Mellin* [1895] AC 154 (folld)

Legislation referred to

Civil Law Act 1956 s 3
Criminal Procedure Code (FMS Cap 6) s 5

Appeal from: Federal Territory Criminal Application No CR 54-20-88 (High Court, Kuala Lumpur)

Cecil Abraham for the appellant.
Hira Singh for the respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): In a notice of motion intituled Federal Territory Criminal Application No CR 54-20 of 1988, the criminal division of the High Court at Kuala Lumpur on 16 September 1988, ordered, inter alia, one Brian Robinson and one Brendan O'Shannassy of the Australian Customs Service and also one Vijandran of the Royal Customs, Malaysia, to forthwith return all documents/files and any copies made of the documents seized by them belonging to Midford (Malaysia) Sdn Bhd and one U Mat.

They, as well as the Director General of the Royal Customs, Malaysia, and the Commonwealth of Australia and their servants/agents were also restrained from conducting any further illegal searches/seizures on the premises of Midford (Malaysia) Sdn Bhd, its employees, agents or partners.

On 21 September 1988, the Director General of Royal Customs, Malaysia and the said Vijandran of Royal Customs, Malaysia, applied by notice of motion for the whole order of the court made on 16 September 1988, to be set aside on the grounds that the court had no jurisdiction to grant the relief sought and that the proceedings adopted in applying for an injunction in a criminal application was misconceived in law as there are no provisions in the Criminal Procedure Code to enable the court to grant the injunction sought.

On 2 December 1988, the Commonwealth of Australia also applied by a notice of motion, inter alia, for the following orders:

1 that the Commonwealth of Australia be granted leave to appear in this action under protest, without prejudice to an application by it to set aside the original application and all its subsequent proceedings;
2 alternatively, that the order dated 16 September 1988 be set aside;

on the grounds, inter alia, that the Commonwealth of Australia is not subject to the jurisdiction of the court by reason of the fact that it is a foreign state recognized by the Supreme Head of the State of Malaysia and is clothed with sovereign immunity; and that there was no jurisdictional and/or procedural basis in law for the action and/or in the form and nature of the relief sought.

Anuar J, who heard the said notice of motion dated 2 December 1988, noted that it was not disputed that the Commonwealth of Australia is a foreign sovereign state but it was contended by Mr Hira Singh, counsel for the said Midford (Malaysia) Sdn Bhd and U Mat, that the Commonwealth of Australia as well as the two Australian customs officers did not enjoy pure absolute immunity. And the learned judge on 15 June 1989 ruled that the Commonwealth of Australia was 'not entitled to pure absolute immunity from the jurisdiction of the Malaysian courts. The court is fortified by the fact that if this case were to be in an English court or if the Commonwealth of Australia were to be Malaysia in an Australian court, the Commonwealth of Australia would not be granted the order asked for, especially the immunity from criminal jurisdiction of the court.'

A notice of appeal was filed by the Commonwealth of Australia on 20 June 1989, and before us Mr Cecil Abraham, its counsel, on the issue of sovereign immunity, referred to the following passage in the judgment of Viscount Finlay in *Duff Development Co* v *Kelantan Government*:[1]

> It is settled law that it is for the court to take judicial cognizance of the status of any foreign government. If there can be any doubt on the matter the practice is for the court to receive information from the appropriate department of His Majesty's government, and the information so received is conclusive.

Counsel also referred to *Village Holdings Sdn Bhd* v *Her Majesty The Queen in right of Canada*[2] in which case Shankar J in the High Court at Kuala Lumpur had recently accepted the certificate of the Secretary General of the Ministry of Foreign Affairs, Malaysia, and it was conceded in that case that the certificate was conclusive proof that Canada was a foreign sovereign state and that the court should take judicial notice of that fact. Mr Abraham pointed out that a certificate of recognition was tendered in these proceedings and submitted that the certificate would be, in accordance with *Duff*'s case,[1] conclusive evidence of the status of the Commonwealth of Australia as a sovereign state. He also pointed out that the learned judge had noted that that was not in dispute. Counsel submitted that if it was intended to restrict sovereign immunity, then an Act of Parliament would have to be passed. He then referred to s 3 of the Civil Law Act 1956, concerning the application of United Kingdom common law as administered in England on 7 April 1956 to West Malaysia and stated that at that time, the law in England on sovereign immunity was as declared in cases such as *The 'Parlement Belge'*.[3]

Counsel also pointed out that it was only in 1981 in *The 'I Congreso del Partido'*[4] that the House of Lords traced the movement away from the pure absolute doctrine of state immunity and confirmed that the common law position was that the restrictive theory applied at common law as well. Counsel stated that in the *Village Holdings* case,[2] Shankar J had held that in Malaysia, the pure absolute doctrine of state immunity applied because of s 3 of our Civil Law Act 1956. Counsel submitted that

that would appear to be the case unless the absoluteness of the doctrine was abrogated or diluted by legislation in this country. Then after referring to *R* v *Madan*[5] in which the UK Court of Criminal Appeal held that the concept of diplomatic immunity applied without the necessity of any distinction being drawn between civil and criminal proceedings, counsel submitted that it was clear that immunity was not confined to civil proceedings only but also extended to criminal proceedings as well and there would be no jurisdiction in this case until that immunity had been waived. But in this case the Commonwealth of Australia was appearing under protest.

We now refer to some of the submissions of Mr Abraham on the concept of the restrictive theory of sovereign immunity. Counsel referred us to the following passages in the judgment of Lord Wilberforce in *The 'I Congreso Del Partido'*:[4]

> The question arises, therefore, what is the position where the act upon which the claim is founded is quite outside the commercial, or private law, activity in which the state has engaged, and has the character of an act done jure imperii. The 'restrictive' theory does not and could not deny capability of a state to resort to sovereign or governmental action: it merely asserts that acts done within the trading or commercial activity are not immune. The inquiry still has to be made whether they were within or outside that activity.
>
> The conclusion which emerges is that in considering, under the 'restrictive' theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.

Mr Abraham stated that the decided cases and the learned authors of textbooks have discussed the distinction between state-like activities of foreign nations or individual sovereigns (acta jure imperii) and their purely commercial activities (acta jure gestionis). He concluded that it was clear from those authorities that it was difficult to formulate a clear-cut distinction between the two concepts but pointed out that a useful guide could be found in the following passage of the judgment of Lord Edmund-Davies in *The 'I Congreso'* case:[4]

> I approach the application of the restricted doctrine of state immunity upon the following basic principles:
>
> II That propounded in the *Empire of Iran* case, 45 ILR 57, 80 that: 'As a means for determining the distinction between acts jure imperii and jure gestionis one should rather refer to the nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity. It thus depends on whether the foreign state has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law.

But it was the submission of Mr Abraham that despite any definitional difficulties in differentiating between acta jure imperii and acta jure gestionis, in the circumstances of the present cases, the nature of the acts of the Commonwealth of Australia for the purposes of this appeal might be assumed to be as physically manifested in the form of the acts of the two Australian customs officers, and cannot be reasonably classified as 'commercial' within the sense in which this word was used in *The 'I Congreso'* case.[4] There was, he submitted, in other words, no doubt that the acts in this case were not 'commercial' because the discharge of functions by the customs arm of a particular government is a well-recognized incident of the governance of states in general. It was his submission that the character of that function, and the nature of acts flowing from a discharge of that function, could not in any sense be classed as 'jure gestionis', ie 'commercial' and are classically 'acta jure imperii'. Counsel concluded that if reference was made to the above-quoted statement of principle by Lord Edmund-Davies in *The 'I Congreso'* case,[4] it was clear that the discharge of functions by the customs arm of a government was something which a private person was not capable of doing, and thus does not have the private law character such as to bring the present proceedings under the heading of acta jure gestionis. It followed, he contended, that the present proceedings would not attract the application of the restrictive version of the doctrine of sovereign immunity.

It was therefore the submission of Mr Abraham that the absolute theory applied in this case and that even if the restrictive version of the doctrine applied in Malaysia as part of Malaysian law, the peculiar circumstances of these proceedings do not invite the application of the restrictive version of the doctrine as the acts complained of are acta jure imperii.

Counsel also drew our attention to the following passage in *Sultan of Johore* v *Tunku Abu Bakar*[6] at p 120.

> Their Lordships do not consider that there has been finally established in England ... any absolute rule that a foreign independent sovereign cannot be implicated in our courts in any circumstances.

and pointed out that apart from a few circumstances, a foreign sovereign is immune from being impleaded in a foreign court.

On the question of whether immunity extended to criminal proceedings, Mr Abraham repeated that no distinction was drawn between civil and criminal proceedings. But in the present proceedings, he submitted that it was necessary to establish that the immunity clearly did extend to criminal proceedings because the learned judge in the court below had held that the immunity did not extend to criminal proceedings. It was his submission that the learned judge had erred in law in coming to that conclusion as it was against the weight of authorities. As

stated earlier on, reference was made by counsel to the UK Court of Criminal Appeal case of *R* v *Madan*.[5] He also pointed out that although the relevant authorities were concerned with a sovereign in the sense of an individual or natural person, there has been a conceptual development which resulted in principles previously applicable to individual foreign sovereigns being extended to cover foreign states as legal entities. Counsel concluded that if the present proceedings were taken to be criminal in character as they purported to be, the Commonwealth of Australia was clearly entitled to the application of the doctrine of sovereign immunity and was entitled to have the court disclaim jurisdiction. If the present proceedings were considered to be civil in substance, the submission applied with greater force. In conclusion, it was submitted that as the learned judge in the court below did not disclaim jurisdiction on the basis of sovereign immunity, his Lordship had erred in law and the appeal to this court ought to be allowed.

Mr Hira Singh, counsel for Midford (Malaysia) Sdn Bhd and U Mat, sent in a long written submission and was allowed to address us for a considerable time. He stated that Midford (Malaysia) Sdn Bhd's counterpart in Australia, ie Midford Paramount Pty Ltd together with two of its directors had been charged for conspiracy in a court in Sydney, Australia. According to the procedure there, it was necessary for the Crown to deposit supporting evidence in the form of documents and statements in the court prior to the commencement of committal proceedings. The two Australian customs officers came to Malaysia and seized documents from the house of an employee of Midford (Malaysia) Sdn Bhd in Kuala Lumpur, and also from its offices located in a factory at Penang without complying with O 66 of the Rules of High Court 1980, governing the obtaining of evidence for foreign courts etc. He said that those two officers had gone to Singapore but had failed to get the evidence for the prosecution of one Peter Bazos. Having failed in Singapore, they came to Malaysia and got the help of Mr T Vijandran, a Malaysian customs officer, who assisted them in raiding, searching and seizing evidence in Kuala Lumpur and Penang. The injunctive order was obtained on 16 September 1988, and served on them before they returned to Australia. Mr Hira Singh stated that the injunctive relief in the order of the court of 16 September 1988, was founded on criminal jurisdiction and submitted that there was no requirement for leave to be obtained in a criminal matter.

Counsel then referred to the common law position regarding state immunity in the United Kingdom. He stated that until comparatively recent times, it was generally accepted that English law afforded immunity to entities of foreign status regardless of whether the dispute arose from commercial activity or the exercise of foreign power. The high water mark of the absolute doctrine of immunity is found in the judgment of Lord Atkin in *Compania Naviera Vascongada* v *SS Cristina*.[7] He stated that it was in the 19th century that the doctrine of absolute immunity, which accorded immunity not only to acts in exercise of the sovereign authority (acta jure imperii) but also to ordinary commercial activity (acta jure gestionis) began to assert itself. The Court of Appeal in England in *The 'Parlement Belge'*,[3] had said that a foreign sovereign could not be sued in personam in the English court. That proposition was not questioned thereafter by the courts in England until the judgment of Lord Denning MR, with whom none of his brethren agreed, in *Rahimtoola* v *Nizam of Hyderabad*[8] and not departed from at any time until the judgments of Lord Denning MR and Shaw LJ in *Trendtex Trading Corp* v *Central Bank of Nigeria*.[9]

Since the Second World War, several European countries such as Italy, Belgium, Austria, West Germany and also the United States of America broke with the rule of absolute immunity and accepted the restrictive theory. In recent times, the beginning to the end of the absolute doctrine of immunity in the United Kingdom law came in November 1975 when the Privy Council gave judgment in *The 'Philippines Admiral'*,[10] an appeal from the Full Court of the Supreme Court of Hong Kong by the government of the Republic of the Philippines. The Privy Council held that, although the absolute theory of immunity applied to all actions in personam, the restrictive view applied to actions in rem. Therefore, as the 'Philippine Admiral' was operated as an ordinary trading ship, no immunity attached to it. Mr Hira Singh pointed out that the House of Lords gave its judgment in *The 'I Congreso Del Partido'* case[4] in July 1981, and were unanimously of the view that the restrictive doctrine applied at common law in respect of actions over trading vessels regardless of whether the action was in rem or in personam.

In a further written submission as well as during his oral submission to us, Mr Hira Singh referred to the certificate of the Malaysian Foreign Ministry issued and dated 8 December 1988, which stated that the Yang di-Pertuan Agung has recognized the Commonwealth of Australia as a foreign state. But he contended that Wisma Putra had only issued the certificate to say that the Commonwealth of Australia is a sovereign state but did not represent that it has sovereign immunity. He contended that whenever the Ministry of Foreign Affairs leaves the question of immunity open, it falls upon the courts of the country to decide whether a foreign state has any sovereign immunity and the type and extent of such immunity. He submitted that the common law in the United Kingdom prior to the UK State Immunity Act 1978, was that as decided by the UK Court of Appeal in the *Trendtex* case,[9] that is, under the common law the doctrine of restrictive immunity would apply, and contended that Mr Abraham's submission that in Malaysia, in order to change the doctrine of absolute immunity, Parliamentary intervention is required was therefore wrong. He pointed out

that the courts in the United Kingdom did not wait for the UK State Immunity Act 1978, and there was no reason why the Supreme Court of Malaysia should wait for Parliamentary intervention. Counsel submitted that the Supreme Court should not miss the opportunity to develop the common law as applied to this country under s 3 of the Civil Law Act 1956 so far as local circumstances render it necessary.

As regards the injunctive order issued on 16 September 1988, Mr Hira Singh referred to s 5 of the Criminal Procedure Code (FMS Cap 6) concerning the applicability here of the contemporary law of England relating to criminal procedure where there is no local law for the time being in force and so far as the same does not conflict or is inconsistent with the said Code. He also referred to the following passage in the judgment of Gibbs CJ of the High Court of Australia in *A-G for the State of Queensland (ex rel Kerr) & Anor* v *T*[11] at p 286:

> While there is no doubt that in appropriate cases the court will grant an injunction to restrain a breach of the criminal law, that is 'an exceptional power confined in practice, to cases where an offence is frequently repeated in disregard of a usually inadequate penalty ... or to cases of emergency'. See *Gouriet* v *Union of Post Office Workers* [1978] AC 435 at p 481.

In his rejoinder to Mr Hira Singh's submission, Mr Abraham stated that the availability of an injunction in the case cited by Mr Hira Singh was highly circumscribed. He referred to the English Court of Appeal case of *CBS Songs Ltd & Ors* v *Amstrad Consumer Electronics plc & Anor*[12] at p 76 in which the principles of law applicable in this particular context was most recently discussed. In that case, it was established that the right to enjoin observance of the criminal law is reposited in the Attorney General (acting ex officio or ex relatione) and in no other person. Reference could be made to the following passage in the judgment of Nicholls LJ in that case:

> But, apart from express statutory provision, persons other than the Attorney General (acting either ex officio or ex relatione) have no standing to seek to enforce, through *a civil court*, the observance of the criminal law as such: their remedy is to bring a private prosecution: see *Gouriet*'s case [1978] AC 435, per Lord Wilberforce at p 477. (Emphasis added.)

Counsel also referred to *Gouriet* v *Union of Post Office Workers*[13] at p 477 where it was held that no person has a standing to seek to restrain an anticipated breach of the criminal law. He also pointed out that *CBS Songs Ltd* v *Amstrad plc*[12] has been affirmed on appeal by the House of Lords.

It was the contention of Mr Abraham that the justification for, and the purpose of the injunction sought and obtained by Midford (Malaysia) Sdn Bhd and U Mat appears to be, from their case as submitted by their counsel, for the due observance of the criminal law, or in other words, the restraining of anticipated criminal acts. He submitted that the principles outlined in the *CBS Songs Ltd*'s case[12] should be applied, and it was clear that they lacked standing and thus an injunction ought not have been issued in those circumstances. As pointed out in *Gouriet*'s case[13] at p 477 and the *CBS Songs Ltd* case,[12] it was plain that the remedy of an injunction was only available, if at all, in the course of the civil jurisdiction of the High Court. But this case was concerned with, he pointed out, the criminal jurisdiction of the High Court since Midford (Malaysia) Sdn Bhd and U Mat have both invoked the criminal jurisdiction of the High Court. Therefore, on that basis as well, no injunction should have been issued. In any event it was the submission of the Commonwealth of Australia that even if an injunction was properly available in the peculiar circumstances of these proceedings, its basic contention was that it was entitled, as a foreign state, to the unqualified application of the universally accepted principle that as such it is entitled to sovereign immunity from the criminal and/or civil jurisdiction of the courts of Malaysia. Counsel concluded that that basic tenet of public and private international law should be given effect to irrespective of the niceties of procedural law.

It is hardly necessary for us to point out that an injunction is an equitable remedy and the jurisdiction to grant relief by way of injunction was in England formerly exercisable only by the High Court of Chancery and by courts of common law in certain cases. The jurisdiction of the Court of Chancery and the common law courts in England having been transferred to the High Court of Justice, every branch of the High Court then had jurisdiction to grant injunctions but only in all cases in which courts of equity or common law could formerly grant that relief. The High Court in England has no jurisdiction to prevent the commission of acts which are merely criminal or illegal (see *Prudential Assurance Company* v *Knott*;[14] *White* v *Mellin*[15]). To prevent an act of a public nature, the Attorney General is a necessary party to the proceedings and no person has locus standi to apply for an injunction to restrain an anticipated breach of the criminal law as pointed out in *Gouriet* v *Union of Post Office Workers*[13] and *CBS Songs Ltd & Ors* v *Amstrad Consumer Electronics plc & Anor*.[12] And in the latter case, it has been pointed out that if it is necessary to seek to enforce the observance of the criminal law, a relator action ought to be brought in a civil court. Therefore, a High Court in this country when exercising its criminal jurisdiction and even taking into account the provisions of s 5 of the Criminal Procedure Code (FMS Cap 6), should not in the exercise of its powers, when hearing a criminal cause or matter, purport to grant relief by way of an injunction to individuals. On this score alone and for these reasons, the order of the High Court of 16 September 1988, should not have been made.

However, that was not the end of this matter as the question of the sovereign immunity of the Commonwealth of Australia in our courts, whether exercising civil or criminal jurisdiction, was also involved in this case. Section 3 of the Civil Law Act 1956 only requires any court in West Malaysia to apply the common law and the rules of equity as administered in England on 7 April 1956. That does not mean that the common law and rules of equity as applied in this country must remain static and do not develop. We have not been referred to any cases decided by the former Court of Appeal or the Federal Court after 7 April 1956, on the subject of sovereign immunity nor have we discovered any such cases decided after that date. It is correct, as pointed out, that the law in England on sovereign immunity on 7 April 1956, was as declared in cases such as *The 'Parlement Belge'*.[3] That is, at that time a foreign sovereign could not be sued in personam in our courts. But when the judgment in *The 'Philippine Admiral'*[10] was delivered by the Privy Council in November 1975, it was binding authority in so far as our courts are concerned. Therefore, by that time the common law position on sovereign immunity in this country would be that the absolute theory applied to all actions in personam but the restrictive view applied to actions in rem. When the *Trendtex* case[9] was decided by the UK Court of Appeal in 1977, it was of course for us only a persuasive authority, but we see no reason why our courts ought not to agree with that decision and rule that under the common law in this country, the doctrine of restrictive immunity should also apply. That is more so in view of the very strong persuasive authority in *The 'I Congreso'* case[4] in which the House of Lords had in July 1981, unanimously held that the restrictive doctrine applied at common law in respect of actions over trading vessels regardless of whether the actions were in rem or in personam. We are therefore of the view that the restrictive doctrine should apply here although the common law position of this country could well be superseded and changed by an Act of Parliament later on should our legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country.

Finally, we have to consider whether the acts complained of were done within the trading or commercial activity of the foreign state, that is, whether they were acta jure gestionis or whether the acts were within the sphere of the governmental or sovereign activity of that state, that is, whether they were acta jure imperii? We were of the view that the acts of the two Australian customs officers considered in the whole context of this case could not be classified as 'trading or commercial' (see *The 'I Congreso* case[4]) and agree with Mr Abraham that the exercise of the functions of the customs arm of the Australian government in the peculiar circumstances of this case could not be classed as acta jure gestionis, ie commercial in accordance with accepted international standards and were therefore acta jure imperii. In applying the doctrine of sovereign immunity, our courts, whether in the exercise of its civil or criminal jurisdiction, should have by international comity disclaimed jurisdiction in this case especially after the production of the certificate from Wisma Putra stating that the Yang di-Pertuan Agung has recognized the Commonwealth of Australia as a foreign state. In the circumstances and for the reasons stated, we therefore allowed the appeal with costs and set aside the order of the High Court dated 16 September 1988.

Appeal allowed.

Solicitors: *Shearn Delamore & Co*; *Asbir, Hira Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Chua Hee Hung & Ors v QBE Supreme Insurance Bhd

SUPREME COURT (KOTA KINABALU) — CIVIL APPEAL NO 223 OF 1986
LEE HUN HOE CJ (BORNEO), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
8 JANUARY 1990

Civil Procedure — Enforcement of judgment — Prohibitory order — Application to set aside on ground that judgment debtor has no beneficial interest in property — Failure to lodge caveats — Sabah Land Ordinance (Cap 68), ss 94, 100, 103 & 116

Land Law — Prohibitory order — Judgment debtor ceasing to have beneficial interest in land — Land registered in name of judgment debtor sold, purchase price received and possession given to vendors — Seller bare trustee for purchasers — Failure to lodge caveats — Effect on beneficial interest of purchasers — Sabah Land Ordinance (Cap 68), ss 94, 100, 103 & 116

In this case, the respondents had obtained judgment against one Chu Yun for the sum of $120,266.35 with interest. Part of this sum was paid but the balance sum of $32,550.25 remained unsatisfied. The respondents obtained a prohibitory order against shares in two leases and this was registered against the two leases. Subsequently the solicitors for Chu Yun notified the solicitors for the respondents that their client had no more interest in the properties concerned as the properties on which flats had been built had been sold more than ten years ago. The three appellants claimed to have bought the flats from Chu Yun and to have paid the full purchase price for the flats. Although Chu Yun was the registered owner of the shares in the leases, he had sold his interests in them to the appellants, had received full payment of the purchase moneys and had allowed the appellants to enter into possession of the two units of flats. The appellants applied for the prohibitory order to be set aside on the ground that Chu Yun has no saleable interest in the land. The learned trial judge dismissed the application and the appellants appealed.